

To account for the normal variation in EEO performance within even the best companies, a minimum level of performance conveying eligibility for certification would be established, e.g.:

1. 80% of the company's units would have at least two of the three elements (I, II and III) above; and
2. Each of the company's units would have at least one of the three elements (I, II and III).

A few broadcasters are already Superperformers,445/ and some

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445/ The Tennessee Study found that "a handful of stations may well be EEO "superperformers", while the majority of the stations operated EEO programs which were of only marginal effectiveness." It reached this conclusion because (1) "[s]ix percent of stations reported the use of no referral sources at all and 24% reported no sources which produced minority referrals....the median number of productive minority sources was only two. However, 11% of the stations reported five or more productive sources of minority referrals, and 25% of the stations reported five or more productive sources of female referrals"; and (2) eleven of the fifteen potential pairs of the six EEO program attributes revealed a statistically significant correlation. Stations which used a large number of referral sources tended to have more productive sources for minorities; those with productive sources for minorities tended to have productive sources for women; those with large numbers of referral sources also tended to offer training or internships and to participate in job fairs; and those offering training and internships were more likely to participate in job fairs." See p. 49 supra. The Tennessee Study also observed that "[t]he fact that five stations each generated more than fifty minority applicants demonstrates that minority applicants are in plentiful supply. Apparently, minorities are attracted to the stations which have built a reputation for employing them. Similarly, the fact that twelve stations each generated more than fifty female applicants demonstrates that female applicants are in plentiful supply. The fact that the same pattern of high recruitment numbers for a handful of stations obtained for women as obtained for minorities demonstrates that the high number of minority applicants at a handful of stations cannot be attributed to format considerations alone." See pp. 50-51 supra.

have been Superperformers for years.<sup>446/</sup> Others are highly motivated,<sup>447/</sup> and could be Superperformers if the Commission issues a challenge and provides the incentives.

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<sup>446/</sup> The Federal Glass Ceiling Commission commented favorably on Gannett Co., Inc.'s "Partners in Progress" program, instituted in 1979 by Chairman Allen Neuharth. Gannett's program "encompasses strategies for recruiting, hiring, developing, and promoting minorities and women. The program features a system to measure performance of managers in developing minorities and women. It is aimed at high potential individuals for participation in management development programs. College recruitment and internship programs aimed at minorities and women ensure a diverse pool of talent from which future company leaders will emerge. The program, which has been tracked since 1981, has produced high percentages of minority and female employees and managers." Glass Ceiling Environmental Scan, p. 176. The FCC may accept partial credit for Gannett's program, which germinated within the company as an outgrowth of WHEC, 52 FCC2d at 1079 (finding a Gannett television station's 1969-1972 EEO performance to be deficient.) Gannett is the type of company which should have an opportunity to be deemed a "Superperformer" and receive the fruits of its seventeen years of exceptional behavior.

<sup>447/</sup> Emmis Communications has an outstanding record in female employment. Its CEO, Jeffrey Smulyan, "believes that aggressive recruitment efforts will allow blacks and Hispanics to be the next to move into leadership positions." "Women now run five of Emmis' eight stations," Inside Radio, March 8, 1996, p. 2.

**X.     The Commission Should Develop Internal Procedures To Modernize And Strengthen Its EEO Enforcement Efforts**

**A.     The Commission should increase its exposure to the rapidly evolving equal opportunity field**

The Commission can take two steps to heighten its awareness of the equal opportunity field.

First, it should announce a policy of holding oral argument in most EEO cases considered for possible designation for hearing, and on all applications for review of initial decisions after hearings.<sup>448/</sup>

Second, the Commission should invite the EEOC to conduct periodic compliance updates for the commissioners, the eighth floor and Bureau staffs, and the administrative law judges.<sup>449/</sup>

**B.     The Commission should facilitate the participation of citizen intervenors in evidentiary hearings**

Private attorneys general should be able to be compensated from a public interest fund in the relatively rare occasions when they try EEO cases in hearing.<sup>450/</sup> Alternatively, an Office of

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<sup>448/</sup> From 1962 through 1965, the Commission held seven oral arguments in broadcast cases. From 1992 through 1995, it held one.

<sup>449/</sup> The FCC/EEOC Agreement provides that "the parties shall conduct reviews of the implementation of this agreement to assure proper effectuation. In this regard, liaison meetings between appropriate senior officials of both agencies to exchange views on matters of common interest and responsibility shall be held from time to time as determined by such liaison officers to be necessary." Id. at 2332. The EEOC's designated liaison officer is the Executive Director or his designee, and the FCC's designated liaison officer is the General Counsel or his designee. Id.

<sup>450/</sup> The Commission would need to create such a fund itself, since involuntary reimbursement by the licensee are beyond the Commission's jurisdiction. See Radio Station WSNT, Inc., 45 FCC2d 377 (1974); compare Office of Communication of the United Church of Christ v. FCC, 465 F.2d 519 (D.C. Cir. 1972) (reversing Commission's refusal to authorize voluntary reimbursement).

Public Counsel, similar to public consumer advocates employed by several state and municipalities, could be created to represent petitioners to deny in hearings. The task of trying a hearing requires enormous work; it is a fulltime job and is usually done pro bono in EEO cases.<sup>451/</sup>

The courts have long recognized the value of petitioners to deny.<sup>452/</sup> Modest relief from the enormous burdens of prosecuting a hearing would be an important step toward facilitating public participation in the Commission's processes.

**C.    The Commission should include EEO in its alternate dispute resolution program**

The Commission has well established alternate dispute resolution (ADR) procedures. See 47 CFR §1.18. However, these procedures have never been tried in an EEO case. Selection of a case for the ADR program could be triggered by a petitioner's request, the licensee's request, or the Bureau's request, tracking

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<sup>451/</sup> Citizen groups challenging broadcast license renewals "generally have limited resources and few procedural tools for gathering evidence about broadcasters' employment practices." Bilingual II, 595 F.2d at 635. See also Stone, 466 F.2d at 332 ("the renewal process [must not be] a meaningless exercise or a never-ending battle for which [representatives of the public] have insufficient resources."

<sup>452/</sup> A petitioner to deny is "like a complaining witness who presents evidence to police or a prosecutor whose duty it is to conduct an affirmative and objective investigation of all the facts and to pursue his prosecutorial or regulatory function if there is probable cause to believe a violation has occurred." UCC II, 425 F.2d at 546. Thus, even petitioners' lack of success in persuading the Commission to deny an application, should not be viewed "as defeat for petitioners, but as successful public intervention which this court has consistently welcomed as serving the public interest." Stone, 466 F.2d at 332.

the D.C. Circuit's approach for ADR in administrative appeals.<sup>453/</sup> The Commission's administrative law judges already have experience as "settlement judges" in comparative hearings, and they could easily translate that experience to nonhearing, prehearing and hearing cases involving the EEO Rule.<sup>454/</sup>

**D.    The Commission should establish  
a Task Force on Equal Opportunity**

We have endorsed the recommendation of American Women in Radio and Television that the Commission conduct a negotiated rulemaking on many of the issues in this proceeding. But the Commission should not stop at a single negotiation in its efforts to build badly-needed dialogue between public interest organizations (such as those filing these Comments) and broadcasters who both support and oppose EEO enforcement. A long term dialogue could be managed by a permanent Task Force on Equal Opportunity, with membership drawn from industry, community groups, the EEOC, the U.S. Commission on Civil Rights, the Civil Rights Division of the U.S. Department of Justice, and the Commission's staff (ex officio). We suggest three projects the Task Force might undertake:

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<sup>453/</sup> See United States Court of Appeals for the District of Columbia Circuit Order Establishing Appellate Mediation Program, November 28, 1988 (subsequently amended April 19, 1989, March 7, 1990, May 1, 1992 and March 20, 1993), incorporated in the Circuit Rules of the United States Court of Appeals for the District of Columbia Circuit at Appendix III. On at least one occasion, the D.C. Circuit diverted an FCC EEO appeal to its ADR program, with successful results.

<sup>454/</sup> The Commission might wish to participate in the omnibus study of ADR in job discrimination cases which is being performed by the Cornell University School of Industrial and Labor Relations. See Fair Employment Report, August 28, 1996, p. 138.

First, the Task Force should enlist the assistance of broadcasters and community groups to develop a computerized EEO recordkeeping and tracking system which is compatible with most broadcasters' existing office software. See p. 346 supra.

Second, the Task Force should enlist the assistance of broadcasters and community groups to develop and publish a Restatement of Equal Opportunity in Broadcasting, Cable and Telecommunications. The Restatement should be published in both looseleaf hard copy and CD-ROM versions to facilitate updating. No such text exists, but one certainly should exist. If it did, broadcasters could find and follow the law inexpensively and easily, avoiding significant errors in their EEO compliance programs and thereby reducing the likelihood of Commission scrutiny.

Third, the Task Force could create an equal opportunity website, with civil rights and EEO news, guidance, and bulletin boards for open dialogue and for media workers' job searches and media employers' EEO recruitment.<sup>455/</sup>

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<sup>455/</sup> Such a website would likely be a great success. See Report on Improving Commission Processes Released, FCC News Release, July 25, 1996, p. 2 (noting that the Bureau has set up a new website for Audio Services that included status information for pending and blocked construction permits and an on-line technical information database that can be queried using a station's call letters. It logged over 940 "hits" in July.)

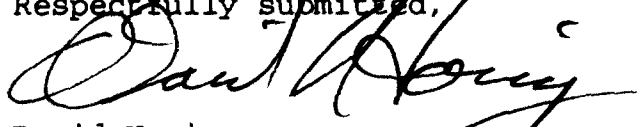
### **CONCLUSION**

We dedicate these Comments to the man with the big heart, Dr. Everett C. Parker, founder of the Office of Communication of the United Church of Christ and the father of equal opportunity in broadcasting. Dr. Parker conceived of the EEO Rule, persuaded the Commission to adopt it, and brought the seminal cases in the field. He continues to serve as the Acting Chair of the Foundation for Minority Interests in Media and as a leader on the MMTC Board, and his assistance with these Comments was indispensable. Everett Parker has a long memory, but fortunately he has forgotten to retire.<sup>429/</sup>

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Respectfully submitted,



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